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In the Supreme Court of the United States

OCTOBER TERM, 1978

KATHLEEN R. REITER, PETITIONER

v.

SONOTONE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INDEX

	Page
Interest of the United States	1
Question presented	2
Statement	2
Argument	5
Conclusion	14

CITATIONS

Cases:

Ampicillin Antitrust Litigation, In re, 1977-1 Trade Cas. ¶ 61,434	6
Bravman v. *Bassett Furniture Industries, Inc.*, 552 F. 2d 90, cert. denied, 434 U.S. 823	6
Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477	4, 7, 9, 11
Califano v. *Sanders*, 430 U.S. 99	13
Chattanooga Foundry & Pipe Works v. *City of Atlanta*, 203 U.S. 390	3, 5, 7, 8
City of Lafayette v. *Louisiana Power & Light Co.*, 435 U.S. 389	2
Cleary v. *Chalk*, 488 F. 2d 1315, cert. denied, 416 U.S. 938	5-6
Commissioner v. *Brown*, 380 U.S. 563	10
Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, In re, 1977-2 Trade Cas. ¶ 61,639	6
DeGregorio v. *Segal*, 443 F. Supp. 1257	6
Ernst & Ernst v. *Hochfelder*, 425 U.S. 185	10

Cases—Continued

	Page
FCC v. *Pacifica Foundation*, No. 77-528 (July 3, 1978)	10
Goldfarb v. *Virginia State Bar*, 421 U.S. 773	6, 12
Gutierrez v. *E. & J. Gallo Winery Co.*, 425 F. Supp. 1221	7
Hanover Shoe Inc. v. *United Shoe Machinery*, 392 U.S. 481	8
Hawaii v. *Standard Oil Co.*, 405 U.S. 251	1, 8
Illinois Brick Co. v. *Illinois*, 431 U.S. 720	2, 4, 8, 9
Mandeville Island Farms, Inc. v. *American Crystal Sugar Co.*, 334 U.S. 219	8
National Society of Professional Engineers v. *United States*, No. 76-1767 (April 25, 1978)	12
Pfizer Inc. v. *Government of India*, 434 U.S. 308	5, 8
Smith v. *Toyota Motor Sales U.S.A., Inc.*, No. 75-0727 (N.D. Cal. Jan. 11, 1977)	7
Theophil v. *Sheller-Globe Corp.*, 446 F. Supp. 131 appeal docketed, No. 78-7389 (2d Cir. 1978)	6
TVA v. *Hill*, No. 76-1701 (June 15, 1978)	12
Weinberg v. *Federated Department Stores, Inc.*, 426 F. Supp. 880	7

Statutes:

	Page
Clayton Act, 15 U.S.C. 12 *et seq.*:	
Section 3, 15 U.S.C. 14	3
Section 4, 15 U.S.C. 15	1, 2, 3, 5, 9, 10, 11, 12, 13
Section 4A, 15 U.S.C. 15a	2

Statutes—Continued

	Page
Hart - Scott - Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 15c *et seq.*:	
Sections 4C-4H, 15 U.S.C. 15c-15h	5
Section 4C(a), 15 U.S.C. 15c(a)	12
Sherman Act, 15 U.S.C. 1 *et seq.*:	
Section 1, 15 U.S.C. 1	3
Section 2, 15 U.S.C. 2	3

Miscellaneous:

	Page
21 Cong. Rec. (1890):	
P. 2564	10
P. 2569	10
P. 2571	10
1978 Economic Report of the President	7
H.R. Rep. No. 94-499, 94th Cong., 1st Sess. (1975)	13
S. Rep. No. 94-803, 94th Cong., 2d Sess. (1976)	13
1 P. Areeda & D. Turner, *Antitrust Law* (1978)	7
2 P. Areeda & D. Turner, *Antitrust Law* (1978)	6, 10
R. Bork, *The Antitrust Paradox* (1978)	7

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INTEREST OF THE UNITED STATES

Private actions for damages pursuant to Section 4 of the Clayton Act, 15 U.S.C. 15, have served an important role, supplemental to that of public actions, in enforcing the antitrust laws. *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 262 (1972). The United States therefore has an interest in preserving the effectiveness of private actions, and it has participated as

amicus curiae in many private antitrust cases that this Court has considered in recent years. See, *e.g.*, *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977); *Group Life and Health Insurance Co.* v. *Royal Drug Co.*, No. 77-952, argued October 11, 1978.

The United States has a special interest in this case because Section 4A of the Clayton Act, 15 U.S.C. 15a, gives the United States a right to recover the actual damages it suffers as a result of violations of the antitrust laws. The United States purchases, as consumer, substantial quantities of goods. In these cases the United States stands in the same relation to any price fixer as petitioner stands to the persons from whom she buys, and the adoption of the court of appeals' position therefore would restrict the right of the United States to recover for loss caused by overcharges made by sellers.

QUESTION PRESENTED

Whether consumers who pay higher prices for goods or services as a result of antitrust violations are injured in their "property" within the meaning of Section 4 of the Clayton Act, 15 U.S.C. 15.

STATEMENT

Petitioner commenced this suit on behalf of a class seeking treble damages from respondents, five hearing aid manufacturers, under Section 4 of the Clayton

Act, 15 U.S.C. 15.[1] The complaint alleged that these manufacturers had committed a variety of antitrust violations that damaged petitioner and members of her class by causing them to pay higher prices for hearing aids and services than would have prevailed in a competitive marketplace.[2] Respondents argued that petitioner and the class have no treble damages remedy under Section 4 because they have not alleged that they were injured in their business or commercial interests.[3]

The district court rejected respondents' argument. It pointed out that Section 4 confers a right of action on persons injured in their "business or property" and that *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390, 396 (1906), established that "property" includes "the money of the plaintiff" (Pet. App. A-9). The term "property" would be redundant, the district court reasoned, if it embraced only commercial interests (*ibid.*). The court also observed that the legislative history of Section 4 de-

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[1] Petitioner seeks to represent a class of all persons in the United States who have purchased hearing aids at prices affected by the alleged antitrust violations. No decision on the propriety of this broadly defined class has been made.

[2] The complaint alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, and of Section 3 of the Clayton Act, 15 U.S.C. 14. The complaint essentially challenges constraints the manufacturers allegedly placed on dealers in the distribution and sale of hearing aids.

[3] Respondents also argued that the alleged injuries were too remote from the antitrust violations to confer standing to sue for damages under Section 4. This issue was not reached in the court below.

scribed in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977), indicated that Congress intended to give a treble damages remedy to retail consumers. A requirement that plaintiffs establish injury to a commercial or business interest as a prerequisite to suit would frustrate this intent, the court reasoned (*id.* at A-9 to A-11).

The district court certified the case for an interlocutory appeal pursuant to 28 U.S.C. 1292(b), and the court of appeals reversed (579 F. 2d 1077; Pet. App. A-12 to A-31). It held that consumers who allege "no injury of a commercial or competitive nature are not injured in their property under section 4 of the Clayton Act" (*id.* at A-30 to A-31) and therefore may not recover damages for antitrust violations.[4] The court of appeals relied on certain legislative history, the perceived absence of a square holding to the contrary by this Court or a court of appeals, and its belief that many "gigantic consumer class actions" are anticompetitive and might be used to exact unfair settlements from small or medium

[4] The court of appeals declined to address the question whether petitioner's treble damage action is foreclosed by the direct purchaser requirement of *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977) (Pet. App. A-14 n.3). Petitioner contended in the court below that this case fell within an exception to the direct purchaser requirement described in *Illinois Brick*. See 431 U.S. at 736 n. 16. The district court described petitioner as "the classic consumer plaintiff" (Pet. App. A-3) because the complaint alleges a conspiracy to affect the retail price of a consumer product on which plaintiff relies.

sized businesses and thereby "preserve an oligopolistic economic climate" (*id.* at A-28, A-29).

A petition for rehearing en banc was denied by a vote of 4 to 3. The three dissenting judges stated that the panel decision conflicted with the rationale of this Court's decisions in *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, *supra*, and *Pfizer Inc.* v. *Government of India*, 434 U.S. 308 (1978), effectively nullified the parens patriae provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 15c-15h, and was an improper substitution of judicial policy for the legislative view of the desirability of treble damages actions (Pet. App. A-31 to A-33).

ARGUMENT

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that persons injured in their "business or property" because of violations of the antitrust laws may recover treble damages. This Court long ago concluded that the use of the disjunctive in the statute is significant and that "[a] person whose property is diminished by a payment of money wrongfully induced is injured in his property" within the meaning of Section 4. *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390, 396 (1906). The courts of appeals have followed this approach to Section 4 and have held that consumers of products are injured in their "property" when they pay higher prices attributable to antitrust violations. See, *e.g.*, *Cleary* v. *Chalk*, 488 F. 2d 1315, 1319 n.17 (D.C.

Cir. 1973), cert. denied, 416 U.S. 938 (1974).[5] Many cases have reached the conclusion implicitly, granting recovery to consumer-purchasers without considering the scope of Section 4. See, *e.g.*, *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 782 (1975). Two eminent scholars have concluded that "property" includes the interest of an overcharged consumer. 2 P. Areeda & D. Turner, *Antitrust Law* ¶¶ 334b, 337a (1978).

The decision of the court of appeals here thus is a departure from a long tradition of cases allowing consumers to recover damages for antitrust injuries inflicted directly on them. It turns the statutory requirement of injury to "business or property" into a requirement of injury to "business property" by holding that no one can recover without proving "injury of a commercial or competitive nature" (Pet. App. A-30). The United States believes that the decision of the court of appeals is wrong and would seriously undercut the effectiveness of antitrust enforcement. Because of its importance, and because of the disagreement now prevailing among the federal courts, this Court should grant review.[6]

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[5] See also, *e.g.*, *Bravman* v. *Bassett Furniture Industries, Inc.*, 552 F. 2d 90, 98-99 & n.23 (3d Cir.), cert. denied, 434 U.S. 823 (1977); *DeGregorio* v. *Segal*, 443 F. Supp. 1257, 1260-1261 (E.D. Pa. 1978); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 1977-2 Trade Cas. ¶ 61,639 (C.D. Cal. Sept. 16, 1977); *In re Ampicillin Antitrust Litigation*, 1977-1 Trade Cas. ¶ 61,434 (D. D. C. May 17, 1977).

[6] The same question is pending before two other courts of appeals. See *Theophil* v. *Sheller-Globe Corp.*, 446 F. Supp. 131 (E.D.N.Y. 1978), appeal docketed, No. 78-7389 (2d Cir. 1978) (consumers may recover); *Weinberg* v. *Federated Department Stores, Inc.*, 426 F. Supp. 880 (N.D. Cal. 1977); *Gutierrez* v. *E. & J. Gallo Winery Co.*, 425 F. Supp. 1221 (N.D. Cal. 1977); *Smith* v. *Toyota Motor Sales U.S.A., Inc.*, No. 75-0727 (N.D. Cal. Jan. 11, 1977), appeals in all three cases docketed, Nos. 77-1724, 1725, 1845, 1850-1852 (9th Cir.) (consumers may not recover).

1. Consumer welfare is a primary purpose of the antitrust laws. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n. 10 (1977).[7] In any ordinary sense a consumer is injured in his "property" when a conspiracy in restraint of trade forces him to part with more money than competitive forces would require. In the case of a conspiracy among retailers, the consumer is the *only* direct victim.[8] And the consumer's injury in such cases is unquestionably "antitrust injury" in the sense that it flows directly from conduct that the antitrust laws were intended to prevent, for his benefit. It would therefore be extraordinary if a consumer injured by a conspiracy among retailers has no remedy. Yet that is what the court of appeals held here. In so doing it disregarded principles established by this Court.

Chattanooga was a suit by a municipality against a supplier of pipe. The City used the pipe in its waterworks. The defendant argued that the City had not been injured in its "business or property,"

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[7] See generally R. Bork, *The Antitrust Paradox* 50-89 (1978); 1 P. Areeda & D. Turner, *supra* at ¶¶ 103-113.

[8] The importance of ensuring competition in this market can scarcely be overstated. Expenditures for personal (nonbusiness) consumption exceeded $1.2 trillion last year (*1978 Economic Report of the President* 257, Table B-1), and most of these expenditures involved retail purchases.

but this Court disagreed. Instead of deciding the case on the ground that the City had been injured in its "business" of supplying water, the Court concluded that the City had been injured in its "property" by being overcharged. See 203 U.S. at 396-397.

The Court has since held that foreign governments may recover treble damages for overcharges that affect them as consumers, and it remarked that the statute gives a remedy to "all who are made victims of the forbidden practices." *Pfizer Inc.* v. *Government of India*, 434 U.S. 308, 312 (1978), quoting from *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948). See also *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972) (citing *Chattanooga* for the proposition that consumers who are overcharged are injured in their property);[9] *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977) (in distinguishing between direct purchasers, who can recover under Section 4, and indirect purchasers, who cannot, the Court assumed that consumers could recover); *Hanover Shoe Inc.* v. *United Shoe Machinery*, 392 U.S. 481, 489-490 (1968) (explaining that an overcharged buyer is injured in his property under Section 4, and relying on *Chattanooga*).

[9] The Court also referred in a general way to "injuries to the 'business or property' of consumers" (*id.* at 264). Although the Court then remarked (*ibid.*) that "business or property" refers to "commercial interests or enterprises," it did not mean this to exclude the interests of the very "consumers" to which it had just referred. The Court made the remark only as part of an explanation why Section 4 does not authorize recovery for injuries to the economy at large.

The court of appeals explained these and other cases as holding only that businessmen are injured in their "property" when they are overcharged as consumers. Thus *Chattanooga*, the court of appeals asserted, is a case in which the City was injured, in its property, in the course of its business of providing City services. The distinction will not wash. *Chattanooga* was not decided on that ground, and, at all events, the court of appeals' treatment of it makes the distinction between "business" and "property" vanish. There would have been no need for the Court to identify a loss to "property" in *Chattanooga* if the dispositive fact was an injury to the City's "business" of providing water to its residents.

2. Section 4 was designed to serve two principal purposes—to compensate the victims of an antitrust violation and to deter future violations by making them costly. *Illinois Brick Co.* v. *Illinois*, *supra*, 431 U.S. at 746. The legislative history of Section 4, discussed in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, *supra*, demonstrates that Congress intended to make compensation available to identifiable victims of "antitrust injury," a class that includes consumers.

The court of appeals, however, invoked two arguments from the legislative history in an attempt to establish that Section 4 does not protect consumers.

The court first pointed out that the portion of the statute authorizing treble damages originally had spoken of remedies for "any person or corporation" injured by an antitrust violation, and that Congress had changed this language to the present reference to

"[a]ny person * * * injured in his business or property" (Pet. App. A-15 to A-17). The court thought that this suggested an intent to restrict recoveries to business injuries, and it fortified this inference with the statements of opponents of the legislation who prophesied that the change in language would leave consumers unprotected (*id.* at A-16 to A-17). But the change in language does not suggest an intent to restrict recoveries to business injuries; if that were Congress' intent, it would have said simply that a person injured "in his business" may recover damages.[10] The restriction to "business or property" injury is more naturally read as a requirement that the injury be proximate and concrete. See generally 2 P. Areeda & D. Turner, *supra*, at ¶¶ 334-342. That is, injuries to reputation, remote injuries, injuries to the general economy, and injuries that do not flow from a restriction of competition are outside the scope of Section 4 (see *Illinois Brick Co., supra; Brunswick Corp, supra*), but direct injuries to the victim's pocketbook are compensible. The court of appeals' reliance on hyperbolic statements of opponents of the legislation was unwarranted; such statements are entitled to little weight (*Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 204 n.24 (1976)),

[10] In other words, the court of appeals' interpretation of Section 4 deprives the words "or property" of all meaning. It therefore collides with the principle that words in statutes should be given meaning unless that would lead to absurd or unintended results. *FCC* v. *Pacifica Foundation*, No. 77-528 (July 3, 1978), slip op. 11; *Commissioner* v. *Brown*, 380 U.S. 563, 571 (1965).

especially where, as here, the proponents of the bill rejected them as groundless and stated their intent to give a remedy to consumers.[11]

The court of appeals' second argument from the legislative history was based on statements pervading the consideration of the bill that Congress intended to provide a remedy to those suffering business injury (Pet. App. A-18 to A-19). There is no doubt that Congress intended to offer protection to persons injured in their business. But statutes often have more than one purpose, and nothing in any of the debates to which the court of appeals referred indicates that the protection of business was the *sole* purpose of Section 4. Its language, and the statements of its supporters (see note 11, *supra*), indicate that it was not so limited.

The court of appeals appears to have been influenced by a belief that class actions by consumers seeking to recover for injuries caused by antitrust violations are themselves anticompetitive. The court asserted that such suits are meritless but that they inflict substantial injury on defendants, especially on small businesses (Pet. App. A-28 to A-30). This argu-

[11] See, *e.g.*, 21 Cong. Rec. 2564 (1890) (remarks of Sens. Sherman and Reagan); *id.* at 2569 (remarks of Sen. Sherman); *id.* at 2571 (remarks of Sen. Teller and Rep. Hiscock). As this Court has emphasized, the treble damage action was "conceived of primarily as a remedy for '[t]he people of the United States as individuals,' *especially consumers*," thus "opening the door of justice to every man, whenever he may be injured by those who violate the antitrust laws." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc., supra*, 429 U.S. at 486 n. 10 (emphasis added.)

ment is difficult to accept; it entails the proposition that consumer suits such as *Goldfarb* v. *Virginia State Bar*, *supra*, are "meritless" and inflict injury on competition. The court's conclusion also reached far beyond the scope of its own argument: the court banned all consumer suits, not simply large class suits against small businesses. The more fundamental objection to the court of appeals' argument, however, is that the judicial branch is not authorized to substitute its judgment for that of Congress concerning the appropriate way to enforce the antitrust laws. *National Society of Professional Engineers* v. *United States*, No. 76-1767 (April 25, 1978), slip op. 12; cf. *TVA* v. *Hill*, No. 76-1701 (June 15, 1978), slip op. 38-40. Congress has authorized both class actions and suits by persons injured in their "property"; the fact that, in the court of appeals' view, some plaintiffs bring meritless suits is irrelevant.

3. Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 15c(a), authorizes state attorneys general to bring civil actions to obtain monetary relief on behalf of natural persons injured in their property by violations of the Sherman Act. It creates no new substantive cause of action, but rather authorizes suits by attorneys general as one device for aggregating and litigating claims proper under Section 4 (see *Illinois Brick Co.* v. *Illinois*, *supra*, 431 U.S. at 734 n.14). Title III does not allow recovery on behalf of any business entity; recovery is limited to injured consumers. Consequently, if the court of appeals' decision denying

consumers a right of recovery is upheld, the new legislation is nullified.

Congress expected Title III to afford relief to consumers by overcoming the practical difficulties to bringing class action suits.[12] The legislation is absolutely pointless if consumers have no right to seek damages.[13] Although the enactment of Title III did not create any new right of recovery, it surely demonstrates the almost universal understanding that consumers are entitled to recover under Section 4. See *Califano* v. *Sanders*, 430 U.S. 99 (1977) (drawing on 1976 amendment to demonstrate the understanding of Congress about the meaning of a 1948 statute). That the court of appeals' holding cuts against the views of a recent Congress, and frustrates the effectiveness of recent legislation, is still a further reason why the Court should grant review.

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[12] See, *e.g.*, H.R. Rep. No. 94-499, 94th Cong., 1st Sess. 3-8 (1975); S. Rep. No. 94-803, 94th Cong., 2d Sess. 8-10, 39-42 (1976).

[13] The court of appeals assumed that its decision would not foreclose parens patriae actions under Title III (Pet. App. A-29). But because Title III authorizes only collective actions on behalf of persons entitled to recover under Section 4, and because Title III forbids collective actions on behalf of businesses, the court of appeals' assumption is unsupported. A holding that consumers have no rights under Section 4 necessarily disables state attorneys general from suing on their behalf under Title III.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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